Supreme Court, U. S.
FILED
JUN 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. A-75-1064.

JACK B. KREMENS, Individually and as Hospital Director of Haverford State Hospital; FRANK S. BEAL, Individually and as Secretary of Public Welfare of the Commonwealth of Pennsylvania; WILLIAM B. BEACH, JR., Individually and as Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania,
Appellants,

v.

KEVIN BARTLEY; STEVE GENTILE; LESLIE LEVINE; VICKI MATHEWS; MARK WEAND; Minors, Through Their Next Friend, Individually and on Behalf of All Others Similarly Situated,
Appellees.

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania.

BRIEF OF THE DEVEREUX FOUNDATION, THE MELMARK HOME INC., THE WOODS SCHOOLS, AND THE ALLEGHENY VALLEY SCHOOL FOR EXCEPTIONAL CHILDREN AS AMICI CURIAE.

BAYARD M. GRAF,
HAROLD E. KOHN,
SAMUEL E. KLEIN,
KOHN, SAVETT, MARION & GRAF, P. C.,
1214 IVB Building,
1700 Market Street,
Philadelphia, Pennsylvania. 19103

FRANK E. HAHN, JR.,
OBERMAYER, REBMANN, MAXWELL & HIPPEL,
14th Floor, Packard Building,
Philadelphia, Pennsylvania. 19102

Attorneys for Amici Curiae.

International Printing Co., 711 So. 60th St., Phila., Pa. 19143 — Tel. (215) 727-5711

TABLE OF CONTENTS.

	Page
CONSENT OF THE PARTIES	1
INTEREST OF THE *Amici*	2
STATEMENT OF THE CASE	4
ARGUMENT	6
I. Parents Have a Substantive Right, as Well as a Duty, to Control the Way in Which Their Minor Children Are Raised	6
II. The Decision of the Court Below Unreasonably Interferes With the Right of Parents to Exercise Control Over the Upbringing of Their Minor Children	8
CONCLUSION	12

TABLE OF CITATIONS.

Cases:	Page
Eby Estate, 70 Penna. D. & C. 2d 408 (1975)	9
Meyer v. Nebraska, 262 U. S. 390 (1923)	6
Pierce v. Society o fSisters, 268 U. S. 510 (1925)	6
Stanley v. Illinois, 405 U. S. 645 (1972)	6
Wisconsin v. Yoder, 406 U. S. 205 (1972)	7
Statutes:	
Pennsylvania Mental Health and Retardation Act of 1966, P. L. 96, Art. I, §§ 101 et seq., Special Sess. No. 3, 1966, 50 P. S. § 4101 et seq.	4
Child Protection Services Law, P. L. 438, No. 124, § 1 et seq., November 26, 1975, 11 P. S. § 2201 et seq.	11

CONSENT OF THE PARTIES.

All parties to this litigation, by their attorneys, have consented to the filing of this brief. Their consents are on file with the Clerk of this Court.

INTEREST OF THE *AMICI*.

Amici are private, non-profit state-chartered corporate organizations engaged in providing residential treatment, training and educational services to the developmentally disabled and emotionally disturbed through the private sector. These institutions are similar to the private secondary schools which have been in existence throughout the United States since its founding. These organizations have all depended on private philanthropy for their creation, development and growth. They are not state agencies. They meet certain state education standards and regulations in order to be licensed by the Pennsylvania Department of Public Welfare to operate a facility for the mentally handicapped and to be licensed as private academic schools by the Commonwealth of Pennsylvania, Department of Education, State Board of Private Academic Schools; otherwise, they are not subject to direct control of any state agency. In other words, Pennsylvania does not have operational control over *amici* and others similarly situated.

The Devereux Foundation, established in 1912, is a Pennsylvania non-profit corporation duly qualified in the States of Arizona, Arkansas, California, Connecticut, Georgia, Massachusetts, Maine, and Texas.

The Melmark Home Inc. is a Delaware non-profit corporation duly qualified in Pennsylvania which began operations in 1966, with its principal office in Newtown Township, Delaware County, Pennsylvania.

The Woods School is a Pennsylvania non-profit corporation established in 1913 with its only facility located on a 300 acre tract in Langhorne, Bucks County, Pennsylvania.

The Allegheny Valley School For Exceptional Children is a Pennsylvania non-profit corporation founded on August 31, 1960.

All *amici* have enrolled children in residence under the age of eighteen years whose parents reside in Pennsylvania and other states. These children have been enrolled *voluntarily* with *amici* by their parents, after careful evaluation, because of the particular expertise developed and acquired by each for the care of exceptional children. Exceptional children are collectively classified as developmentally disabled, which includes the emotionally disturbed, mentally retarded, cerebral palsied, multi-handicapped and neurologically disfunctioned. All children may be withdrawn from the facilities at any time by the parents or persons in *loco parentis* and no child is retained in any of the facilities against his will.

The *amici* exist to enable parents to secure outstanding care, training and education for their children, and to aid the children themselves through specialized and advanced techniques for the care and education of the developmentally disabled. The order of the Court below serves to prohibit any admission to the facilities of *amici* without a full adversary hearing—a hearing which will inevitably dissuade parents from seeking proper care and treatment for their children and possibly exacerbate the child's condition, rendering care and education more difficult, if not impossible. Parent, child and institution should cooperate for the development of the exceptional child. Any order which places the parent and child in an adversary relation is damaging to and interfers with the institution's effort to aid the child. The *amici* believe that these consequences threaten their ability to serve both parents and children. For these reasons, the *amici* submit this brief to urge this Court to reverse the decision of the court below.

STATEMENT.

The facts and previous decisions in this case are detailed in the brief of appellants and we restrict ourselves to a summary statement.

The Complaint below was instituted on November 16, 1972 on behalf of the named plaintiffs and "all persons under eighteen years of age who have been, are, or may be admitted or committed to Haverford State Hospital and all other *state* mental health facilities under the challenged provisions of the state statute." (emphasis added). The *amici,* as *private* institutions offering services to the developmentally disabled and mentally handicapped in Pennsylvania, were neither notified of the commencement of the action nor offered an opportunity to participate in the proceedings below. By Order dated April 29, 1974, the court below confirmed the class, and on November 17, 1975, entered its Final Order, paragraph 1 of which found that the action was properly maintained as a class action on behalf of "all children eighteen years of age or younger who have been, are, or may be admitted or committed to mental health or mental retardation facilities in Pennsylvania under the Pennsylvania Mental Health and Mental Retardation Act of 1966. 50 P. S. §§ 4402 and 4403 (§§ 402 and 403)." Thus, although none of the named plaintiffs had been admitted or committed to a private, as opposed to state, mental institution, and although the Complaint sought relief only on behalf of those admitted to state facilities, the Final Order nonetheless appears to apply to all voluntary admissions to private mental facilities in Pennsylvania.

As the result of the procedure followed below, *amici* were deprived of the opportunity to participate in proceedings which directly affect the manner in which its students are admitted. *Amici,* as private facilities provid-

ing valuable mental health/mental retardation services to children at the request of their parents were unable to introduce testimony as to their procedures with respect to voluntary admissions of persons under eighteen years of age, the effects of a full adversary hearing on the ability of parents to obtain adequate care for their children and the ability of *amici* to provide adequate care and training after such a hearing.

ARGUMENT.

I. Parents Have a Substantive Right, as Well as a Duty, to Control the Way in Which Their Minor Children Are Raised.

The right of parents to exercise control over the upbringing of their children has long been recognized as a fundamental tenet of the American way of life. *Meyer v. Nebraska*, 262 U. S. 390 (1923). In *Pierce v. Society of Sisters*, 268 U. S. 510, 534-35 (1925), in striking down a state compulsory public education act, this Court held:

> "Under the doctrine of Meyer v. Nebraska, 262 U. S. 390 (1923), we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

This Court has repeatedly reaffirmed parental assertions of the right to direct the upbringing and education of children under their control. In *Stanley v. Illinois*, 405 U. S. 645, 651 (1972), this Court stated:

> "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 262 U. S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1072 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U. S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655 (1942), and '[r]ights far more precious than property rights,' May v. Anderson, 345 U. S. 528, 533, 73 S. Ct. 840, 843, 97 L. Ed. 1221 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U. S. 158, 166, 64 S. Ct. 438, 422, 88 L. Ed. 645 (1944). The integrity of the family unit has found protection in the Due Process clause of the Fourteenth Amendment, Meyer v. Nebraska, *supra*, 262 U. S. at 399, 43 S. Ct. at 626, the Equal Protection clause of the Fourteenth Amendment, Skinner v. Oklahoma, *supra*, 316 U. S. at 541, 62 S. Ct. at 1113, and the Ninth Amendment, Griswold v. Connecticut, 381 U. S. 479, 496, 85 S. Ct. 1678, 14 L. Edd 2d 510 (1965) (Goldberg, J., concurring)."

As succinctly stated by this Court in *Wisconsin v. Yoder*, 406 U. S. 205, 232 (1972):

> "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."

The recognized right of parents with respect to the upbringing of their children, including provision for care, education, guidance, training and therapeutic treatment for the developmentally disabled comes to the Court deserving of respect. *Amici* are outstanding private institutions designated by certain parents to afford special facilities for the provision of these special services to their children who have special needs. In reaching its decision

the court below overlooked and ignored the long recognized principles of the parent-child relationship designed to assist in the mental development of the child. In addition, the law imposes a duty on parents to care adequately for their children; and the law of nature compels such a duty. The decision below removes from the parents the right and opportunity to freely perform their recognized responsibility to assist their children. Such infringement of the parent's legal rights, therefore, must be carefully scrutinized and presumed to be invalid in order to prevent a split between parent and child which could result in the dissolution of the family unit.

II. The Decision of the Court Below Unreasonably Interferes With the Right of Parents to Exercise Control Over the Upbringing of Their Minor Children.

The total adversary proceeding mandated by the elaborate due process procedures required by the District Court ruling unjustifiably and improperly involves the state in the decision-making process of the family with regard to a child's welfare. Legal representation for the child is mandated and cannot be waived. In virtually all cases, the attorney selected to represent the child will be court appointed and paid by the state. The full post-commitment hearing necessitates that the state, through its judiciary, oversee the admission procedure and make the final determination. The state is thus inextricably bound up with, and indeed controls, the parent's right to procure adequate provision for the care and training of their developmentally disabled children. Further, the full adversary proceeding mandated by the court below will inevitably impose upon the family high legal fees. This additional expense to a family already heavily burdened with bills for the care of a child with special problems and

faced with the prospect of continuing expenses for such care is unconscionable. This adversary proceeding, moreover, imposes upon parents and children a conflict which should not exist and can, as is stated in the prior section of this brief, bring about a dissolution of the family unit.

In short, the mandatory involvement of the state in every admission to a mental health or mental retardation facility, whether a private placement or a placement in a state-operated facility, and whether or not the child voices an objection to the admission, spells the end of voluntary admissions and eviscerates the parent's right properly to care for a child. Under the procedures set by the court below, parents must agree to engage in a full adversary proceeding with their own child before securing the opportunity for proper response to the child's needs based upon appropriate professional advice and must necessarily force the parents and child to endure the stigma of a judicial finding by "clear and convincing proof" of mental illness. The modern thinking in this field opposes "labeling". Yet this procedure would require an adjudication which officially labels a child needing special services.

These procedures can only lead to the demise of voluntary admissions to special educational facilities for the mentally ill/mentally retarded or other handicapped children, with a resultant *decline* in the care available to such children, including those children who voice no objection to admission or commitment. Indeed, certain religious groups in Pennsylvania consciously seek to avoid judicial proceedings. In *Eby Estate*, 70 Penna. D. & C. 2d 408 (1975), the Court noted that the religious beliefs of the Mennonites, "one of the plain sects which have been of the fabric of Lancaster County . . . have consistently and determinedly avoided adversary proceedings before the courts." Groups such as these will therefore be unable to

obtain the care required for their children should the guidelines established by the court below be upheld.

No justification exists for imposing such harsh procedural requirements on parents and children. By requiring a hearing to test the propriety of the parental decision to seek admission to a special educational facility, the Court presumes the parental decision to have been improper. This presumption is underscored by the necessity of "clear and convincing proof" to support continued institutionalization. No justification in fact or in law warrants this judicially-created presumption. Are courts to question and presume invalid other parental decisions, such as the decision to send a child to boarding school, merely because some degree of "confinement" is involved? Are hearings to be required before a parent, acting on the advice of physicians, can procure medical or surgical services for their children? There is no challenge to the placement of children with high intelligence quotients in institutions selected by their parents. At what point in the spectrum of intelligence quotients is it necessary or mandatory that parents justify, with "clear and convincing proof," placement of their children with institutions such as *amici*?

Amici contend that adequate safeguards can be maintained, and indeed do exist, to prevent the occasional case of alleged misuse of parental responsibility without an all-encompassing presumption of invalidity for all parental decisions. To hold otherwise would shift the burden of highly personal decisions regarding many aspects of a child's life from the family and trained specialists to the impersonal arena of courts, judges and court-appointed attorneys. In Pennsylvania any person, including any licensed physician, nurse or mental health professional, who in the course of his or her employment or practice of his or her profession comes in contact with a child believed

to have been abused *must* report this belief to a state agency. Failure to so report is a summary offense under the Pennsylvania Penal Code. See Child Protective Services Law, P. L. 438, No. 124, §§ 1 *et seq.*, November 26, 1971, 11 P. S. §§ 2201 *et seq.* Thus, the burden of reporting and preventing parental malplacement of children is properly placed on the facility, which is responsible under both the penal and civil laws and ethical professional standards to insure that improper placements are not tolerated. This burden is where it should be, for the facility can utilize its professional expertise to insure against abuse in voluntary admissions, and the strength of the Child Protective Services Law provides adequate protection for the rights of the child. It is respectfully submitted that the existing safeguards adequately protect the interests of the child, parents and the state.

In any event, parents who have an established right and duty to direct the upbringing and the care and education to be provided for their children, and the private facilities selected by them to provide such services, were deprived of the opportunity to be heard. The Opinion and Order below impose unreasonable burdens on parents, and the trauma of a full adversary hearing may well result in irreparable damage to an already mentally ill, disturbed or retarded child, and further deteriorate an already dangerous condition. However, *amici* were not afforded the opportunity to participate in the proceedings or to offer evidence of the adverse effect of these full due process hearings upon available special private services for children who need them and whose parents desire to provide them. For this reason and other reasons hereinbefore mentioned, the action should at the very least be remanded to the court below for the development of a full record by all those directly affected by the result of its decision.

CONCLUSION.

The total adversary procedure prior to any admission to a facility treating the mentally ill or mentally retarded or developmentally disabled mandated by the court below seriously and unjustifiably interferes with the right, duty and opportunity of parents to procure adequate educational facilities, care and guidance for their children, and should be reversed. At the very least, the private facilities directly affected by the decision of the court below should have been afforded the opportunity to participate in the proceedings and develop a record. Failure to notify *amici* of the pendency of this action irreparably taints the proceedings.

Respectfully submitted,

BAYARD M. GRAF,
HAROLD E. KOHN,
SAMUEL E. KLEIN,
KOHN, SAVETT, MARION & GRAF, P. C.,
1214 IVB Building,
1700 Market Street,
Philadelphia, Pennsylvania. 19103

FRANK E. HAHN, JR.,
OBERMAYER, REBMANN, MAXWELL & HIPPEL,
14th Floor Packard Building,
Philadelphia, Pennsylvania. 19102
Attorneys for Amici Curiae.